IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT WHEELING

V. TAD GREENE, ON BEHALF OF
HIMSELF AND AS PERSONAL
REPRESENTATIVE OF C.G.
AND ASHLEY L. GREENE,

Plaintiffs,

vs CASE NO. 5:10CV104

NATIONWIDE MUTUAL INSURANCE
COMPANY, AN OHIO CORPORATION,

Defendant.

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO REMAND

The defendant, Nationwide, has filed a brief in opposition to the plaintiffs' motion to remand. Ignoring Fourth Circuit law, Nationwide argues that it has met its burden of proving the amount in controversy by presenting a single piece of evidence--its offer of judgment. But this court is bound to apply Fourth Circuit law, including *Lovern vs. General Motors Corp.,* 121 F.3d 160 (4th Cir. 1997). Under *Lovern,* the plaintiffs' motion to remand must be GRANTED.

To begin with, Nationwide expresses some confusion over its burden of proof. Citing *Ellenburg vs. Sparton Motors Chassis, Inc.,* 519 F.3d 192 (4th Cir. 2008), Nationwide seems to suggest that the burden of proof in removal cases have been lightened. However, as this court has recognized, *Ellenburg* was addressing a pleading issue, i.e., the sufficiency of the allegations in a notice of removal. Where a party challenges removal jurisdiction, the defendant, as the removing party, "must show by a preponderance of the evidence that [the plaintiffs' claim] meets the requisite amount in controversy." *April*

Streight vs. State Farm Mut. Automobile Ins. Co., Civil Action No. 5:09CV106 (N.D. W.Va. 11/20/09); see also *Wickline vs. Dutch Run-Mays Draft, LLC,* 606 F.Supp.2d 633 (S.D. W.Va. 2009)("although it has sufficiently *pled* jurisdiction, defendant is nevertheless required to *show* by a preponderance of the evidence that jurisdiction in this court is proper").

Nationwide's brief is a study in avoidance. At every opportunity, Nationwide attempts to avoid Fourth Circuit law--and its implications.

It is interesting that Nationwide cites the leading Fourth Circuit case, *Lovern,* and even quotes from it. Nevertheless, Nationwide refuses to accept the fact that *Lovern* has adopted a purely *objective* test for determining whether, or not, grounds for removal exist:

> We will not require courts to inquire into the subjective knowledge of the defendant, an inquiry that would degenerate into a mini-trial regarding who knew what and when. Rather, we will allow the court to rely on the face of the initial pleading and on the documents exchanged in the case by the parties to determine when the defendant had knowledge of grounds for removal, *requiring that those grounds be apparent within the four corners of the initial pleading or subsequent paper." Lovern,* 121 F.3d at 162.

Accordingly, this court may only consider the facts appearing within the "paper" upon which Nationwide is relying, i.e., its offer of judgment. It does not matter what Nationwide knew, or when. The only thing that matters is what facts are contained within the four corners of its offer of judgment.

This is important for two reasons.

First, Nationwide is trying to bootstrap. On at least two occasions, Nationwide refers to the fact that it engaged in discovery, obtained medical records and bills, and then proceeded to reevaluate the plaintiffs' claims. RESPONSE, AT 1-2, 7. But none of this is actually before the court. Where are the medical records? Where are the bills? Nationwide has not produced any of this documentation so that the court can independently review it and evaluate it. *Lovern* is crystal clear that none of these so-called facts may be considered in determining whether, or not, Nationwide has met its burden of proof.

Second, Nationwide is trying to explain its thought process in evaluating the plaintiffs' claims. Apparently, Nationwide wants the court to believe that there was some rational basis for its offer of judgment. But, again, *Lovern* tells us that the issue is not "who knew what and when." This court may only consider the facts contained within the paper before it. In this case, the only paper is an offer of judgment which was made and expired 10 days later. This, in and of itself, has no evidentiary value whatsoever and will not support removal.

Nationwide also ignores Fourth Circuit law requiring that removal must result from a plaintiff's voluntary act. It is improper for a defendant to manufacture federal jurisdiction by its own conduct or by a document of its own making. Rather, as this court has long held, federal jurisdiction under §1446(b) must be the product of a voluntary act by the plaintiff. See, e.g., *King vs. Kayak Mfg. Corp.,* 688 F.Supp. 227, 229 (N.D. W.Va. 1988). Here, of course, there is no dispute that the offer of judgment was prepared and served by Nationwide itself, and that the plaintiffs did nothing to subject themselves to federal jurisdiction.

Left with no Fourth Circuit law to cite in support of its removal, Nationwide is forced to look elsewhere. But even the handful of cases cited in Nationwide's brief do not withstand scrutiny.

Nationwide cites *In Re Willis,* 228 F.3d 896 (8th Cir. 2000), but its interpretation of that case is tortured at best. Even at the district court, the plaintiff in *Willis* did not dispute that the amount in controversy was, indeed, more than $75,000 and that federal jurisdiction existed. *Perry vs. Willis,* 110 F.Supp.2d 1197, 1198 (E.D. Mo. 2000)("plaintiff does not dispute that the $75,000 amount in controversy requirement for diversity jurisdiction is met"). The only issue was whether the defendant's removal was timely. The case went to the Eighth Circuit via a writ of mandamus. The appeals court held in a short, *per curium* opinion that the district court wrongly applied the 30 day time period for removal. In no way, shape or form does *Willis* address the issue presented here.

Next, Nationwide cites *Banger vs. Magnolia Nursing Home,* 234 F.Supp.2d 633 (S.D. Miss. 2002). The court in *Banger* made the following finding: "The court finds that the complaint, on its face, seeks to recover an amount that could exceed $75,000." True, the court also referred to an offer of judgment, but this simply was an *additional* fact supporting its finding. In other words, the court believed there was sufficient evidence to support removal even without the offer of judgment. Here, the offer of judgment is Nationwide's only evidence.

Nationwide also cites *O'Brien vs. Ed Donnelly Enterprises,* 575 F.3d 567 (6th Cir. 2009), a case it says stands for the proposition that an offer of judgment can be "use[d]…in determining jurisdictional question." But *O'Brien* is simply a mootness case, and nothing more.

The plaintiffs in *O'Brien* were employees of a McDonald's franchise alleging a failure to pay wages. At some point in the litigation, the defendants offered to pay $61,000--the full amount of the damages alleged in Counts I and II. The plaintiffs did not accept the offer. However, the trial court found that the making of the offer of judgment mooted Counts I and II.

O'Brien is a far cry from this case. The question in *O'Brien* was: did the offer of judgment fully satisfy the plaintiffs' demand? The court simply compared the offer with the prayer in the plaintiffs' complaint. Because the offer fully satisfied the demand made by the plaintiffs, the claim was moot.

Here, Nationwide is attempting to use its offer of judgment as substantive evidence, i.e., as evidence of the value of the plaintiffs' claim. Nationwide is asking the court to look at the amount of its offer of judgment and draw an inference regarding the claim's value. This is evidence, and Rule 68 specifically prohibits the use of an offer of judgment as "evidence."

At the conclusion of its motion, Nationwide makes request for oral argument pursuant to Local Rule 78.01. Because the issue presented is a straightforward legal issue, oral argument is unnecessary. The court has everything before it necessary to grant the plaintiffs' motion to remand. Nothing that could be said during oral argument could be considered as evidence to support Nationwide's burden of establishing the requisite amount in controversy.

For all of the reasons articulated herein, Nationwide has not sustained its burden of proof. Thus, plaintiffs' motion to remand should be GRANTED.

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AND AS PERSONAL REPRESENTATIVE OF C.G.
AND ASHLEY L. GREENE, PLAINTIFFS,

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CERTIFICATE OF SERVICE

Service of the foregoing REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO REMAND was had upon the defendant herein on the 18th day of November, 2010, by filing electronically with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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